SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

_____ TERM, 1974

No. 73-2011

VESTOL VERNON RAMSEY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. JAMES KRONZER
500 Houston 1st Savings Bldg.
Houston, Texas 77002

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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VESTOL VERNON RAMSEY, *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, VESTOL VERNON RAMSEY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been officially reported and is printed herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 2, 1974. Petitioner's Motion

for Rehearing was overruled on June 12, 1974. This Court's jurisdiction is founded upon 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether payment of a "gratuity" to a public official amounts to a violation of either 18 U.S.C. 1341 (Mail Fraud) or 18 U.S.C. 1952 (Travel Act).

2. Whether a written statement "shared" by two chief Government witnesses should be available to a defendant for use in cross-examination pursuant to 18 U.S.C. 3500 and the Fifth and Sixth Amendments.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment
Sixth Amendment
18 U.S.C. 1341 (Mail Fraud)
18 U.S.C. 1952 (Travel Act)
Texas Penal Code Art. 177
Texas Penal Code Art. 159
18 U.S.C. 3500 (Jencks Act)

(Since the statutes involved are lengthy, all the above citations are contained in Appendix B pursuant to Rule 23. 1.(d).)

STATEMENT OF THE CASE

Shoup Corporation, a manufacturer of voting machines based in Pennsylvania, did substantial business with Harris County, Texas. During 1966, 1967 and 1968, one George Chandler, a lawyer selected by Petitioner Ramsey, billed Shoup for non-existent legal services. (R. 151-172) Part of the monies received by Chandler

through interstate mail were remitted to Ramsey who was an elected member of the County Commissioners' Court, the executive authority of Harris County. (R. 686)

No proof was offered that Ramsey entered into any agreement to perform any specific act or omission. No proof was offered that Ramsey in fact performed or omitted any specific act as a result of receiving said monies. No proof of any scheme to defraud was offered other than the fact of the covert receipt of the monies. Ramsey was convicted in violation of 18 U.S.C. 1341 (Mail Fraud) and 18 U.S.C. 1952 (Travel Act), and sentenced to the maximum five year penitentiary term on each Count. (R. 1940)

After being approached by Government Agents, consulting his own lawyer, and finally making a formal statement to the Agents, Chandler (who was the chief prosecution witness) dictated a long narrative statement (R. 1306, 1308) concerning operative events of the prosecution, to his long-time personal secretary, Miss Ann Slaughter (whose testimony at trial firmly corroborated Chandler). The narrative was typed by Slaughter, edited by Chandler and retyped by Slaughter. (R. 661-664)

Pursuant to a pre-trial stipulation of full disclosure on behalf of the Government, Petitioner requested the statement long prior to trial, but was refused. (R. 1486-1487) At trial, Petitioner requested the document pursuant to 18 U.S.C. 3500 (Jencks Act), but was refused. (R. 651) He requested that it be inspected by the Trial Court *in camera,* but was refused. (R. 1309) He requested that the document be sealed and made a part of the record for review, but was refused. (R. 1309) He

issued a subpoena duces tecum for the document as "past recollection recorded", but the subpoena was quashed. (1308-1309) He moved that the testimony of Chandler and Slaughter be stricken and for a mistrial, but such relief was denied. (R. 1349)

During Chandler's testimony the lengthy document lay in a briefcase in the Justice Department at the Court House. (R. 1303) Although Government counsel denied he had ever seen the statement, (R. 1247) he incontestably exercised control over it. In a colloquy with the Court concerning the Court's suggestion that Chandler "might voluntarily relinquish it", Government counsel replied:

> "He is not going to do that if for no other reason than the fact that I have instructed him not to." (R. 1247)

REASONS FOR GRANTING WRIT

I.

A. (Mail Fraud) The question of the legality and morality of covert acceptance of gifts or gratuities by public officials is presently of momentous importance to the Republic. It is a question to which this Court has never addressed itself; neither is there any substantial teaching among the Circuit Courts.

Specifically, the question amounts to this: Is the covert acceptance of monies by a public official *alone* enough to amount to a "scheme to defraud" within the purview of 18 U.S.C. 1341. Does proof of the mere acceptance of money by an official amount to proof that the official entered into a scheme to "deprive the people and taxpayers of the honest and faithful performance of his

duties," as charged in the indictment. (R. 58, 60) Although Petitioner stands convicted of Mail Fraud upon proof of accepting such a gratuity and nothing more, *not one decision by this Court or any U. S. Court of Appeals stands for the proposition that such conduct is within the ambit of 18 U.S.C. 1341.*

The prosecutorial theory is apparently based upon *United States v. Faser,* 303 F. Supp. 380 (E.D. La., 1969) where District Judge West determined in connection with an analogous Mail Fraud Prosecution that "a public employee is not entitled to receive private gain or profit from his transactions . . . unless there is an express agreement between such a public official and his employer.

Whatever moral issues are involved, we are here interested in the legality of such "gifts" and "gratuities". If the acceptance of such monies is within the purview of 18 U.S.C. 1341, then the rule needs to be written in large letters so that "he who runs [for office] may read."

B. (Travel Act) Petitioner is here convicted for precisely the same conduct as a violation of 18 U.S.C. 1952, i.e., that he participated in interstate travel in furtherance of the State law offense of bribery. He is the victim of a double barreled theory of prosecution, alleging the same conduct as a violation of separate statutes. To discuss Mail Fraud without taking cognizance of the Travel Act is for purposes of this prosecution no more than the sound of one hand clapping.

Petitioner is accused of using interstate travel to commit Texas bribery. Art. 159 of the Texas Penal Code, like most state bribery statutes, requires proof: (1) of an "agreement" or "understanding" with the bribing per-

son, and (2) that the bribe was given and accepted so as to affect official action or inaction on some particular matter. Art. 177, Texas Penal Code.

Admittedly, had proof of either requirement existed, then there would be no problem with either the Mail Fraud prosecution or the Travel Act. But to sustain the present Travel Act prosecution, the Court would be constrained to hold that the acceptance of such monies raised a presumption, *for purposes of the State law offense,* that such agreement for specific action or inaction existed. Such is not the law of Texas bribery and is thus in direct conflict with *United States v. Nardello,* 393 U.S. 286 (1969) and *United States v. D'Amato,* 436 F.2d 52 (3 Cir. 1970).[1]

II.

The written "Chandler statement" was shared by the two chief prosecution witnesses. It having been prepared and edited by the both of them, Petitioner contended that it was their joint effort to "get their stories straight." Chandler contended that it was a true statement intended for posterity. It was prepared at a time proximate to the events therein described.

The Government's lawyer attempted to avoid the "Jencks" rule by claiming he had not seen the docu-

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1. Although squarely presented with these issues, the Court below refused to discuss them. As they are clearly issues upon which reasonable minds may disagree, are of momentous importance to the Republic and because this area of law is largely bereft of Appellate Court guidance, Petitioner maintains that the Circuit Court, by its refusal to address itself to them, has "so far departed from the accepted and usual course of judicial proceedings" as to provide sufficient reason for this Court to exercise its discretion in issuing its Writ of Certiorari.

ment, although admittedly it lay in his office during trial and was clearly subject to his control in that he could and did tell Chandler what to do with it.

Thus the present record is left in this situation: (1) A lengthy document exists of undisputed *materiality,* but of potentially disputed admissibility for purposes of impeachment or direct proof (i.e., as past recollection recorded); (2) The Government's chief witness (a lawyer) claimed the document was "the truth"; (3) The Government's corroborating witness (the lawyer's secretary) had read the document on "several occasions"; (4) Government's counsel disclaimed having seen the document; (5) Defense counsel was, of course, not privy to it; (6) the Trial Court refused to make an *in camera* inspection of it; (7) the Trial Court refused to seal it as a part of the record on appeal.

Petitioner suggests this Court decree that when, during trial, a document of such momentous potential importance to the issues at stake is duly determined to exist, that at the very least it be sealed as a part of the record of trial. Any other rule makes a mockery of Petitioner's right to appellate review.

Of course, Petitioner also maintains that he was entitled to use of the statement at trial as a matter of Fifth Amendment "due process", Sixth Amendment "confrontation" and pursuant to 18 USC 3500 (Jencks Act).

CONCLUSION

For the reasons stated above, Petitioner urges this Court to grant a writ of Certiorari to review this Opinion of the United States Court of Appeals for the ~~Ninth~~ Fifth Circuit.

Respectfully submitted,

W. JAMES KRONZER
500 Houston 1st Savings Bldg.
Houston, Texas 77002

CERTIFICATE

The undersigned certifies that each of the persons named below have been served three (3) copies of the foregoing Petition for Writ of Certiorari by mailing same by first-class mail with sufficient postage to cover delivery to:

Hon. James Gough
Appellate Section
United States Attorney's Office
Federal Building
515 Rusk
Houston, Texas 77002

Mr. Victor D. Stone
Assistant Attorney General
Department of Justice
Constitution & Tenth St., N.W.
Washington, D.C. 20530

Solicitor General of the United States
Department of Justice
Room 5143
Washington, D.C. 20530

APPENDIX A

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

VESTOL VERNON RAMSEY, *Defendant-Appellant.*

No. 73-2484

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

May 2, 1974.

Defendant was convicted in the United States District Court for the Southern District of Texas, at Houston, Woodrow B. Seals, J., of using the mail to carry on an illegal activity in violation of Travel Act, of devising a scheme to defraud and for purpose of executing it, violating mail fraud statute, and of conspiring to violate both Travel Act and mail fraud statute, and he appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that trial judge's remarks to defense counsel, including his statement "* * * The defense attorney has a right to be repetitive. He has a right to try to trick this witness." and his inquiry as to how much longer it would be until relevance of a certain line of questioning by defense counsel would become apparent, were not so prejudicial to defendant as to require a reversal.

Affirmed.

Criminal Law—1166.22(3)

Trial judge's remarks to defense counsel, including his statement "* * * The defense attorney has

a right to be repetitive. He has a right to try to trick this witness." and his inquiry as to how much longer it would be until relevance of a certain line of questioning by defense counsel would become apparent, were not so prejudicial to defendant as to require a reversal, when considered separately or in context of the entire trial.

Appeal from the United States District Court for the Southern District of Texas.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Ramsey was indicted by a federal grand jury for (1) using the mail to carry on an illegal activity (bribery), in violation of the Travel Act; (2) devising a scheme to defraud and for the purpose of executing it, violating the Federal Mail Fraud Statute; and (3) conspiring to violate both the Travel Act and the Mail Fraud Statute.[1] He was found guilty under all counts. We affirm.

Ramsey, a county commissioner in Harris County, Texas, was responsible for supervising the county voting machine department. At trial the government introduced evidence tending to prove that Ramsey obtained kickbacks from the Shoup Voting Machine Company in the following manner: Ramsey recommended to Shoup that they

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1. (1) 18 U.S.C. § 1952 states in part, "Whoever . . . uses any facility in interstate . . . commerce, including the mail, with intent to . . . otherwise carry on . . . any unlawful activity . . . shall be fined . . . or imprisoned . . . or both. See, Article 159, Title 5, Vernon's Penal Code of the State of Texas Annotated.
(2) 18 U.S.C. § 1341.
(3) 18 U.S.C. § 371.

retain an attorney, Chandler, to act as Shoup's lobbyist in Harris County. Ramsey had Chandler send Shoup bills for fictitious services. Shoup, the government contends, paid the bills, feeling that pleasing Ramsey was important to continuation of its approximately $200,000 a year business with the county. The payoffs were accomplished in the following manner: Ramsey would ask Chandler to send a bill to Shoup's representative in Tennessee. That representative would then forward the request for payment to Pennsylvania, where a check would be issued and sent to Chandler. When the check arrived, Chandler would cash it and Ramsey would take the cash.

Ramsey, on appeal, has presented nine issues for review.[2] We find that only one issue need be discussed by the court, the others being without merit.

Ramsey urges that the trial court persistently made unfair, improper and repressive remarks to the defense attorney which prejudiced Ramsey's case before the jury. The passages cited by Ramsey from the trial record, however, do not support these allegations. Furthermore, this court, after having carefully reviewed the entire record,

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2. The issues Ramsey presented were these: 1) Was the evidence sufficient to prove a violation of the Travel Act; 2) Was the evidence sufficient to prove bribery under Article 159 of the Texas Penal Code; 3) Was the evidence sufficient as to whether Ramsey "knowingly caused use of the mails to perpetrate a scheme to defraud the taxpayers of Harris County in violation of 18 U.S.C. § 1341"; 4) Was the evidence sufficient to prove a conspiracy between Ramsey, Chandler, Shoup Voting Machine Corporation, and Schote, an officer of Shoup; 5) Were the remarks and rulings by the trial judge improper; 6) Were the limitations on the examination of witness Chandler and witness Slaughter by the court improper; 7) Did the trial court erroneously quash a subpoena to Chandler; 8) Did the trial court properly instruct the jury, and 9) Did the court properly refuse Ramsey's requested instructions concerning the Mail Fraud Statute.

finds no conduct by the trial court which, when considered separately or in the context of the entire trial, could have affected the jury's verdict.

Of the 12 instances where appellant urges prejudicial remarks were made, 11 were rulings on government objections to defense counsel's overly long, repetitious and irrelevant questions, and *in all 11 instances the court ruled in favor of appellant Ramsey.* The only inquiry not part of a ruling was the trial judge asking how much longer it would be until the relevance of a certain line of questioning would become apparent, as the witness had been on the stand for over an hour. When defense counsel assured the judge he would tie it together eventually, he was allowed to continue.[3]

Ramsey indicates that the most severe of the alleged prejudicial remarks was a reply by the trial court to an objection made by the government, ". . . The defense attorney has a right to be repetitive. He has a right to try to trick this witness." In Zebouni v. United States, 226 F.2d 826 (5th Cir. 1955), cited by Ramsey, the trial court referred to a defense tactic as *"foolish,"* and characterized an attempt to put a certain statement into the record as *"self-serving."* Yet, that was not enough to necessitate reversal. In this court's opinion, Judge Rives stated:

> In fairness to the able district judge, we must say that, while the record discloses some irritation and impatience on his part . . . a careful reading of the record as a whole leaves us reluctant to hold that,

3. It is not apparent from the record of this case that the defense attorney was able to tie up any of these lines of questioning. The judge's inquiries were apparently well-founded.

> prior to the close of the evidence,[4] the district judge had so abused his discretion as to necessitate reversal. *Id.* at 828. [Footnote ours].

The law of all the circuits is replete[5] with instances where the equally severe remarks of a trial court were held insufficient for reversal. In United States v. Porter, 441 F.2d 1204 (8th Cir. 1971), the trial court admonished defense counsel for "deliberate tactics," and for "blowing smoke rings" to confuse the jury. In United States v. Chikata, 427 F.2d 385 (9th Cir. 1970), the trial court referred to defense counsel's repetitious interrogation as "just ridiculous." In Cooper v. United States, 403 F.2d 71 (10th Cir. 1968), the court responded to a comment by the defense counsel with "that's ridiculous." In United States v. Penner, 425 F.2d 729 (5th Cir. 1970), a case similar to appellant's, this court held.

> Although the isolated portions of the record quoted on brief might indicate an undue interference by the trial judge with the trial, we think that the first contention is refuted by a perusal of the record as a whole. From such examination it is clear that the main purpose of the trial judge's intervention was to assist the jury and to *discourage efforts by defense counsel to explore irrelevant issues* and to make pre-

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4. The added fact that the trial judge, on his own motion, interrupted the defense attorney during his closing argument to the jury caused this court to grant a new trial.

5. See, Walker v. Bishop, 408 F.2d 1378 (8th Cir. 1969); United States v. Caracci, 446 F.2d 173 (5th Cir. 1971); United States v. Carrion, 463 F.2d 704 (9th Cir. 1972); United States v. Cruz, 455 F.2d 184 (2nd Cir. 1972); United States v. Middleton, 458 F.2d 482 (5th Cir. 1972); Duran v. United States, 413 F.2d 596 (9th Cir. 1969).

> mature jury arguments. The comments of the court were not argumentative and did not indicate his views as to guilt or innocence. [Emphasis added]. *Id.* at 730.

This court, after reviewing the entire record below, finds no single instance nor a totality of action justifying a reversal. Ramsey's conviction in all respects must be

Affirmed.

APPENDIX B

TITLE 18, U.S.C.A.

§ 1341. *Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

* * *

§ 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, § 701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

* * *

§ 3500. *Demands for production of statements and reports of witnesses*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the

United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91-452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

TEXAS PENAL CODE

Art. 177. 193, 144 *"Bribe"*

By a "bribe" as used throughout this Code, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other person, such as are named in this chapter, in the performance of any duty, public or official, or as an inducement to favor the one offering the same, or some other person.

* * *

Art. 159. 175, 126 *Officers accepting bribe*

Any legislative, executive or judicial officer who shall accept a bribe or consent to accept a bribe under an agreement or with an understanding that his act, vote, opinion or judgment shall be done or given in any particular manner or upon a particular side of any question, cause or proceeding which is or may thereafter by law be brought before him, or that he shall make any particular nomination, appointment, or do any other act or omit to do any act in violation of his duty as an officer, shall be confined in the penitentiary not less than two nor more than ten years. Acts 1858, p. 159, amended in revising 1879.

UNITED STATES CONSTITUTION

AMENDMENT V. (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI. (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2484

D. C. Docket No. CR 72-H-396

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VESTOL VERNON RAMSEY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before RIVES, WISDOM and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

May 2, 1974

Issued as Mandate: